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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION ON BEHALF OF THE FEDERAL POWER COMMISSION TO SHORTEN TIME FOR FILING BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND TO ADVANCE CASE FOR ARGUMENT IF CERTIORARI IS GRANTED

Comes now the Solicitor General on behalf of the Federal Power Commission, petitioner in the above entitled cause, and respectfully moves the Court that the time for filing a brief in reply to the petition for writ of certiorari be shortened and that the case be advanced for argument on Monday, May 2,

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1938, or as near thereto during the present term as is agreeable to the Court, in the event that the writ of certiorari is granted and the Court does not desire to reverse the decree of the court below forthwith.

This cause arose out of a proceeding commenced in the United States Circuit Court of Appeals for the Third Circuit seeking to enjoin and prevent the Federal Power Commission from introducing certain evidence in the course of an investigation and hearing instituted by the Commission for the purpose of ascertaining all facts regarding: (1) the ownership, operation, and management of respondents; (2) contracts and working arrangements between respondents and affiliates; and (3) the expenditures made and obligations incurred under such contracts and working arrangements that in any way affected or related to the business of the respondents. The Circuit Court of Appeals on January 27, 1938, entered its decree restraining the Commission from proceeding with the above-mentioned hearing unless the Commission restricts the issues to those specified in the opinion of the court below and introduces only evidence which the opinion attempts to define as "relevant." The petition of the Federal Power Commission to this Court for the issuance of a writ of certiorari to review the decree of the Circuit Court of Appeals was filed on April 1, 1938, and requested that certiorari be granted and the case set down for argument at this Term; or, in the alternative, that cer-

tiorari be granted and the decree below be reversed forthwith with directions that the petition of the respondents in the court below be dismissed.

Copies of the petition for a writ of certiorari and transcript of record were mailed immediately to counsel for the respondents and receipt thereof acknowledged on April 2, 1938. The time for filing a brief in reply to the petition consequently expired on April 22, 1938. On April 20, 1938, however, counsel for the respondents secured from Mr. Justice Roberts an order extending until May 2, 1938, the time for filing a brief in reply to the petition on the ground that respondents' counsel desired to negotiate with the Solicitor General to obtain a stipulation that the transcript of hearings before the Federal Power Commission be included as a part of the record in this Court and printed as such in the event that certiorari should be granted.

As is apparent from the petition for writ of certiorari the question raised by the decree and opinion of the Circuit Court of Appeals is one of great public importance. The gravity of the decision lies in its unsettling effect on the principles governing the review of administrative action, and the confusion resulting from the unsettled state of the law is materially interfering with the administration of the Federal Power Act. Moreover, the immediate effect of the decision below is to jeopardize the progress of an important and far-reaching investigation undertaken by the Federal Power Commission, which has now been delayed for more

than a year. The opinion of the court below orders the Commission to present only such evidence as is relevant to issues raised by the respondents. The test of admissibility is that the relevancy must be "apparent and logical and not far-fetched and remotely inferential." Thus, the Commission is forced to apply a vague test of relevancy laid down in advance, presumably on pain of contempt should it err in the reception of evidence. Unless the restrictions of the court below placed upon the Commission are promptly removed, the Commission will be unable to proceed with its inquiry until the end of the present year in the event of a favorable decision by this Court.

In seeking an extension of time for filing a brief in reply to the petition for writ of certiorari, counsel for the respondents did not advise the Government of its application and no attempt has been made either before or since the extension of time to open negotiations with the Solicitor General for the inclusion of the transcript of the hearings before the Commission as a part of the record in this Court and for its printing as such if certiorari is granted. As is apparent from the petition for writ of certiorari (p. 7, note 2), the testimony before the Commission was not a part of the record in the Circuit Court of Appeals and therefore is not a part of the record in this Court or required to be printed as such. The transcript of the hearings was merely lodged in the Circuit Court of Appeals for the information of that court and has likewise

been lodged with this Court for a similar purpose. It is therefore available for consideration by this Court if the Court desires to examine it. There is consequently no reason for any delay in the filing of a brief in reply to the petition on the ground that time is required for negotiations with the Solicitor General for the inclusion of the transcript of hearings before the Commission as a part of the record in this Court or for its printing as such in the event that the writ of certiorari is granted.

In the light of these circumstances the Government feels that the extension of time was obtained by the respondents for no other purpose than to delay further an early determination by this Court of the question involved and to prevent the Federal Power Commission from proceeding with an investigation of far-reaching importance.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

APRIL 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938